NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. *See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS

DIVISION TWO

Attorneys for Appellant

IN THE COURT OF APPEALS STATE OF ARIZONA DIVISION TWO

THE STATE OF ARIZONA, Appellee, v.) 2 CA-CR 2010-0257) DEPARTMENT B) MEMORANDUM DECISION) Not for Publication
ERIC DEWAYNE HILL,) Rule 111, Rules of) the Supreme Court
Appellant.)) _)
APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY	
Cause No. CR20080274	
Honorable Howard Hantman, Judge	
AFFIRMED	
Thomas C. Horne, Arizona Attorney General By Kent E. Cattani and Amy M. Thorson	Tucson Attorneys for Appellee
Isabel G. Garcia, Pima County Legal Defender	r Tucson

KELLY, Judge.

¶1 Following a jury trial, appellant Eric Hill was convicted of first-degree murder. The trial court sentenced him to life in prison without eligibility for release for

at least twenty-five years. Hill raises numerous issues on appeal. For the following reasons, we affirm.

Background

- We view the facts in the light most favorable to sustaining the verdict. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In January 2008, the victim, A.G., was murdered, and her body was burned and buried in a shallow grave. Eric Hill twice admitted—to a friend and to the mother of three of his children, F.S.—that he had killed her. A.G. was Hill's fiancée and the mother of another of his children.
- At trial, Hill asserted a third-party culpability defense, arguing that F.S. had killed A.G. F.S. and A.G. had a history of disputes, and F.S. had told her sister she had choked A.G. with a belt. During trial, upon learning of new evidence, Hill moved to dismiss the charges against him pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), asserting the state had violated his due process rights by failing to disclose evidence that, he contended, bolstered his third-party culpability defense. The trial court precluded the evidence and denied his motion. This appeal followed Hill's conviction and the court's imposition of sentence.

Discussion

Third-Party Culpability Evidence

Hill first argues the trial court erred by precluding evidence he sought to introduce in support of his third-party culpability defense. Hill sought to present evidence allegedly showing that F.S. had threatened to kill a man and his girlfriend several years prior to the murder of A.G. We review for an abuse of discretion the trial

court's rulings on the relevance and admissibility of evidence. *State v. Rutledge*, 205 Ariz. 7, ¶ 15, 66 P.3d 50, 53 (2003).

The admissibility of third-party culpability evidence is reviewed first for relevancy under Rules 401 and 402, Ariz. R. Evid. State v. Gibson, 202 Ariz. 321, ¶¶ 12-13, 44 P.3d 1001, 1003 (2002). Any such evidence is relevant only if it "tend[s] to create a reasonable doubt as to the defendant's guilt. Id. ¶ 16 (emphasis omitted). And the evidence must demonstrate the third party had the opportunity and motive to commit the crime. See State v. Prion, 203 Ariz. 157, ¶ 25, 52 P.3d 189, 193-94 (2002); see also State v. Tucker, 205 Ariz. 157, ¶¶ 31-32, 68 P.3d 110, 116-17 (2003).

The trial court reasonably could have concluded that evidence of F.S.'s previous threats against strangers to this case, while apparently reflecting on F.S.'s character, had no bearing on her opportunity and motive to kill A.G. three years later, and was therefore irrelevant to Hill's third-party culpability defense. *See Prion*, 203 Ariz. 157, ¶ 25, 52 P.3d at 193-94. The court did not abuse its discretion by precluding this evidence.

Alleged Brady Violations

¶7 Hill next contends the trial court erred by denying his motion to dismiss because the state's failure to discover and disclose evidence of F.S.'s prior threats was a

¹Hill maintains the trial court erred by using the wrong standard: Rule 404(b), Ariz. R. Evid., instead of Rules 401, 402, and 403, Ariz. R. Evid. While the minute entry does not address relevance, focusing instead on Rule 404(b), the transcript of the bench conference shows that the court found the proffered evidence inadmissible because it did not reflect a "common scheme or plan" and was "not relevant." Furthermore, we will uphold the trial court's ruling if it is legally correct for any reason. *State v. Cañez*, 202 Ariz. 133, ¶ 51, 42 P.3d 564, 582 (2002).

violation of its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963).² He also alleges two other *Brady* violations regarding evidence of prior convictions for two state witnesses. We review for an abuse of discretion the trial court's ruling on alleged *Brady* violations. *State v. Medrano*, 173 Ariz. 393, 399, 844 P.2d 560, 566 (1992).

¶8 Hill maintains the state violated its obligation under *Brady* when it failed to discover and disclose the evidence of F.S.'s earlier threats, which he deemed exculpatory; he claims this failure resulted in a violation of his due process rights. However, the failure to disclose such evidence does not automatically violate due process. Due process is violated only where "the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." Strickler v. Greene, 527 U.S. 263, 281 (1999). And "[t]he test for a Brady violation is whether the undisclosed material would have created a reasonable doubt had it been presented to the jury." State v. Montano, 204 Ariz. 413, ¶ 52, 65 P.3d 61, 72 (2003), quoting State v. Dumaine, 162 Ariz. 392, 405, 783 P.2d 1184, 1197 (1989), disapproved of on other grounds by State v. King, 225 Ariz. 87, 235 P.3d 240 (2010). Because we have concluded the trial court did not err in precluding the evidence as irrelevant to Hill's proffered defense, we likewise affirm the court's determination that no Brady violation occurred.

²But "the remedy for a *Brady* violation is a retrial, not dismissal, since *Brady* presupposes the exculpatory evidence still exists." *State v. O'Dell*, 202 Ariz. 453, ¶ 11, 46 P.3d 1074, 1078 (App. 2002); *see also State v. Youngblood*, 173 Ariz. 502, 506, 844 P.2d 1152, 1156 (1993).

Hill further asserts the trial court erred by not finding the state had violated *Brady* when it had failed to disclose impeachment evidence of prior convictions for two of its witnesses. He then states: "Although these violations in and of themselves may not have warranted dismissal, they certainly bolster [his] primary *Brady* argument for dismissal . . . and provide further proof of the State's cavalier disregard for its due process disclosure obligations" But we have concluded that the state's failure to disclose F.S.'s prior threats did not amount to a violation of its *Brady* obligations. Further, when impeachment evidence is presented to the jury during trial, as the prior-conviction evidence was in this case, the disclosure cures any *Brady* violations. *See State v. Jessen*, 130 Ariz. 1, 4, 633 P.2d 410, 413 (1981). Therefore, the court did not abuse its discretion by finding the state had not violated its *Brady* obligations and by denying Hill's motion to dismiss.

Impeachment of F.S.

Hill argues he should have been permitted to use the threats F.S. had made years earlier as prior inconsistent statements to impeach her testimony that she had never threatened to kill anyone other than A.G. To preserve an argument for review, the defendant must make sufficient argument to allow the trial court to rule on the issue. *See State v. Fulminante*, 193 Ariz. 485, ¶ 64, 975 P.2d 75, 93 (1999) ("objection is sufficiently made if it provides the judge with an opportunity to provide a remedy"). But Hill did not place this issue squarely before the court. Rather, in presenting this evidence, the impeachment issue was, at best, conflated with his argument that the threats should

have been admitted as substantive evidence in support of his third-party culpability defense.

And, after the court ruled the threats could not be admitted as substantive evidence, Hill did not ask the court to allow their use as impeachment of F.S. Instead, Hill asked whether her statement could be "provided to [F.S.] to identify as being her statement making those threats." Because the court responded the evidence was "not probative," it is not clear whether it also addressed the issue of impeachment. Further, the court's minute entry for that day of trial made no mention of such a request, and, more importantly, did not address whether a decision was made concerning use of the evidence as impeachment. And Hill apparently did not request such a decision. Therefore, Hill has forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). However, because he does not argue on appeal that the error is fundamental, the argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived if not raised on appeal).

Moreover, even if the issue had been preserved and even assuming, without deciding, the trial court had erred, we "will not reverse a conviction if an error is clearly harmless." *State v. Green*, 200 Ariz. 496, ¶ 21, 29 P.3d 271, 276 (2001), *quoting State v. Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d 1168, 1176 (1998). "Error is harmless if we can say beyond a reasonable doubt that it did not affect or contribute to the verdict." *Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d at 1176.

Hill impeached F.S. with several prior inconsistent statements about how A.G. had been killed. F.S. also admitted she had previously lied to a police detective during the investigation. And portions of F.S.'s testimony were contradicted by the later testimony of two other witnesses. Additionally, the jurors were told F.S. was testifying in exchange for being given immunity from prosecution for her role in the crimes. *See State v. Holsinger*, 115 Ariz. 89, 93, 563 P.2d 888, 892 (1977) (jurors made aware of witness testifying under grant of immunity are "in a position to judge [that witness's] credibility in the light of this information"). Given that Hill was permitted to call into question F.S.'s credibility multiple times, the preclusion of the earlier, non-related threats as impeachment evidence was harmless. *See State v. Nordstrom*, 200 Ariz. 229, ¶ 39, 25 P.3d 717, 732 (2001) ("[A]ny error was harmless given the thoroughness with which [the witness] was impeached.").

Evidence Pertaining to Knowledge of F.S.'s Daughter, K.

Hill next contends the trial court denied his constitutional right to present a defense by precluding evidence that K., his daughter with F.S., "probably witnessed the transportation, burial, and burning of the victim's body," which he argues was relevant to his theory of third-party culpability. He maintains this evidence "gave rise to the inference that [K.] had witnessed them, and to the further inference that [F.S.] had committed the murder and cover-up in the presence of her eldest daughter." We review for an abuse of discretion the court's rulings on the relevance and admissibility of

evidence.³ *Rutledge*, 205 Ariz. 7, ¶ 15, 66 P.3d at 53. Because the evidence was offered in support of Hill's third-party culpability defense, it is relevant only if it "tend[s] to create a reasonable doubt as to the defendant's guilt." *Gibson*, 202 Ariz. 321, ¶ 16, 44 P.3d at 1004 (emphasis omitted).

Specifically, Hill sought to introduce evidence that K., who had been in her mother's care at the time of A.G.'s murder, had engaged in play where she rolled up a body in a blanket, dreamed or talked about a large fire in the desert, and said that A.G. was gone. We agree with Hill that this evidence gives rise to an inference that K. may have witnessed the transportation and disposal of A.G.'s body. But F.S. admitted her own involvement in those events and, in any event, neither F.S.'s admitted involvement nor K.'s play necessarily implicates F.S. in the actual murder of A.G. or creates reasonable doubt about Hill's guilt. *See id.* Consequently, the trial court did not abuse its discretion by precluding this evidence.

Photographic Evidence

Hill maintains the trial court erred in admitting the three photographs taken at the burial site because they were "gruesome," "not particularly relevant," had little probative value, and were "extremely prejudicial." We review a court's decision to admit photographs for an abuse of discretion. *State v. Dann*, 220 Ariz. 351, ¶ 44, 207 P.3d 604, 615 (2009).

³The state argues Hill did not properly preserve this issue for appellate review and, therefore, that we may review only for fundamental, prejudicial error. But we need not decide whether the issue was preserved because even under the less stringent standard of harmless error, we conclude the court did not err.

- To determine the admissibility of an allegedly gruesome photograph, the trial court considers the relevance of the photograph, its inflammatory nature, and whether its probative value is outweighed by the potential for prejudice. *State v. Cruz*, 218 Ariz. 149, ¶ 125, 181 P.3d 196, 215-16 (2008). "Photographs of a victim's body are always relevant . . . 'in a murder prosecution.'" *State v. Morris*, 215 Ariz. 324, ¶ 70, 160 P.3d 203, 218 (2007), *quoting State v. Spreitz*, 190 Ariz. 129, 142, 945 P.2d 1260, 1273 (1997). And relevant photographs that are gruesome or inflammatory may still be admissible unless they are "admitted for the sole purpose of inflaming the jury.'" *Id.*, *quoting State v. Gerlaugh*, 134 Ariz. 164, 169, 654 P.2d 800, 805 (1982). Indeed, such photographs may be admissible to support the state's theory of the case and corroborate, illustrate, or explain the testimony of its witnesses. *State v. Anderson*, 210 Ariz. 327, ¶ 39, 111 P.3d 369, 381-82 (2005).
- First, none of these photographs is especially gruesome or inflammatory. One of them shows the victim's hand, partially covered by dirt. Another is of her head and hand, mostly buried in dirt. And the third photograph, taken from a distance, is of the body, lying in the excavated grave. Second, because all of these photographs depict the victim's body, they are relevant to Hill's prosecution for murder. *See Morris*, 215 Ariz. 324, ¶ 70, 160 P.3d at 218. We, therefore, turn to the balancing of the probative value against the possible prejudice to Hill.
- ¶19 Hill contends the photographs were of little probative value because he contested neither the fact nor the manner of A.G.'s death, disposal, and burial. Yet, even though Hill did not contest these issues, the photographs still could have probative value

"because the 'burden to prove every element of the crime is not relieved by a defendant's tactical decision." *State v. Dickens*, 187 Ariz. 1, 18, 926 P.2d 468, 485 (1996), *quoting Estelle v. McGuire*, 502 U.S. 62, 69 (1991); *see also Anderson*, 210 Ariz. 327, ¶ 39, 111 P.3d at 381-82. Further, the state argued that each of the photographs supported its case. It asserted that the photo of the victim's hand corroborated its theory that she had been strangled from behind, as Hill had told F.S., because all her artificial fingernails were still intact. And the state contended the two other photographs depicting the body together illustrated why the forensic pathologist was not able to definitively establish the cause of death. Therefore, all three photographs had considerable probative value. *See Anderson*, 210 Ariz. 327, ¶ 39, 111 P.3d at 381-82.

Citing *State v. Chapple*, 135 Ariz. 281, 660 P.2d 1208 (1983), Hill nevertheless asserts that the prejudicial effect of these photographs outweighed their probative value. In support of this claim, Hill cites recent cases where our supreme court found error in the trial court's decision to admit certain photographs. *See State v. Davolt*, 207 Ariz. 191, ¶¶ 62-63, 84 P.3d 456, 473-74 (2004); *State v. Bocharski*, 200 Ariz. 50, ¶ 26, 22 P.3d 43, 49 (2001). In these cases, the court concluded that some of the photographs admitted by the trial court were unduly prejudicial and, therefore, admitted erroneously. But none of the photographs in this case are particularly inflammatory, and they are not remotely similar to the detailed, up-close photographs of

⁴Although Hill also cites *State v. Jones*, 203 Ariz. 1, ¶ 32, 49 P.3d 273, 282 (2002), for the same proposition, that court did not explicitly find that the admission of photographs was error. Instead, noting that "introduction of such photographs may well have exceeded any need to prove a contested issue," it concluded that any error would have been harmless. *Jones*, 203 Ariz. 1, ¶ 33, 49 P.3d at 282.

an open skull or of charred bodies and body parts found inadmissible in the cases Hill cites. *See Davolt*, 207 Ariz. 191, ¶¶ 62-63, 84 P.3d at 473-74; *Bocharski*, 200 Ariz. 50, ¶ 26, 22 P.3d at 49; *Chapple*, 135 Ariz. at 287-90, 660 P.2d at 1214-17. The trial court reasonably could have found the probative value of the evidence was not substantially outweighed by any unfair prejudicial effect on Hill. *See* Ariz. R. Evid. 403. Consequently, the court did not abuse its discretion by admitting the photographs.

Disposition

¶21 Hill's convictions and sentences are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ **Philip G. Espinosa**PHILIP G. ESPINOSA, Judge